INTERIOR BOARD OF INDIAN APPEALS

Lower Peoples Creek Cooperative v. Acting Billings Area Director,
Bureau of Indian Affairs

23 IBIA 297 (04/22/1993)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

LOWER PEOPLES CREEK COOPERATIVE
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-12-A Decided April 22, 1993

Appeal from a decision concerning a lease of Indian land.

Affirmed in part; vacated in part; and remanded.

1. Indians: Lands: Tribal Lands--Indians: Leases and Permits: Generally

   Bureau of Indian Affairs officials are not authorized to grant leases of tribal land.

2. Indians: Lands: Individual Trust or Restricted Lands: Generally--Indians: Leases and Permits: Secretarial Approval

   Under 25 U.S.C. § 380 (1988) and 25 CFR 162.2(a)(4), the Bureau of Indian Affairs may grant leases of individually owned trust or restricted land when the heirs have not been able to agree upon a lease during a 3-month period, provided the land is not in use by any of the heirs.

3. Administrative Procedure: Administrative Record--Bureau of Indian Affairs: Administrative Appeals: Generally

   The regulations in 25 CFR Part 2 do not require a Bureau of Indian Affairs Area Director, before whom an appeal is pending, to provide advance notice that he expects to address an issue not decided by the Superintendent or raised by the parties. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them.

APPEARANCES: Jack R. Stone, Esq., Lewistown, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Lower Peoples Creek Cooperative seeks review of an August 27, 1992, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), holding that a lease of Indian land was null and void, and rejecting a request that one of the landowners be assessed trespass damages and evicted from a homesite. For the reasons discussed below, the Board affirms the Area Director's decision in part, vacates it in part, and remands this matter to him for further proceedings.

Background

Appellant is a cooperative of landowners on the Fort Belknap Reservation. 1/ In 1991, it entered into lease 484-91-95, covering all or parts of Fort Belknap Allotments 579, 580, 585-A, and T-580-A, all located in T. 30 N., R. 26 E., Montana Principal Meridian. The lease was approved by the Superintendent, Fort Belknap Agency, BIA, on May 22, 1991, for a term beginning May 22, 1991, and ending December 31, 1995. The lease states that it covers 814.50 acres, more or less, but that 13.43 acres of the total are included in rights-of-way. A land schedule attached to the lease shows two rights-of-way, one for 2.5 acres in the SW¼ of sec. 3, and the other for 10.93 acres in the N½ NW¼ of sec. 10. Both are within Allotment 579.

The lease was signed by Lazure J. Ereaux, Jr., one of the landowners, on behalf of appellant. 2/ Three other landowners signed the lease, also apparently on behalf of appellant, although this is not entirely clear. 3/ No signatures appear in the spaces for lessors. A typewritten note states "consent form on file and made a part hereof." The record includes landowner consents for 43/72 of the interests in Allotment 579, 5/8 of the interests in Allotment 580, and 5/8 of the interests in Allotment 585-A. There is no consent form for Allotment T-580-A, which is owned by the Fort Belknap Indian Community (Tribe). Nor does the signature of any tribal official appear an the lease.

In 1985 or 1986, Frank Ereaux, owner of a 7/72 interest in Allotment 579, had begun living on the allotment, evidently without entering into any formal arrangement with his co-owners. BIA staff, in preparing

_____

1/ According to a Nov. 30, 1991, resolution adopted by appellant, appellant is “a corporation under the laws of the State of Montana, and chartered by the Fort Belknap Community Council.” None of appellant’s organizational papers are included in the record. Nor is any list of appellant’s members included. It appears, however, that the membership of the cooperative consists of some, but not all, of the individual landowners who have interests in allotments subject to the lease at issue here.

2/ Lazure Ereaux's position in appellant's organization is not indicated on the lease. However, the Nov. 30, 1991, resolution mentioned in footnote 1 was signed by him as appellant's Secretary.

3/ The three signatures appear above that of Lazure Ereaux, rather than in the spaces for signatures of lessors.

lease 484-91-95, set aside a 2.5-acre tract for him, although they did not note this specifically either on the lease or on the land schedule. It is possible that the 2.5-acre right-of-way shown on the land schedule was actually intended to represent Frank Ereaux's homesite. 4/

In addition to his interest in Allotment 579, Frank Ereaux owns a 1/2 interest in Allotment 581, which is adjacent to the leased allotments. He used Allotment 581, apparently with the consent of his co-owner, to graze horses and cattle. Because there was no fence, the animals wandered onto the leased allotments. Appellant sought assistance from BIA in removing them. On August 13, 1991, BIA impounded 20 horses and assessed Frank Ereaux $815.24. However, appellant continued to report trespasses. Appellant also alleged that Frank Ereaux's continued presence on Allotment 579 was a violation of its lease.

Following a lengthy correspondence between appellant and the Agency, on February 26, 1992, appellant filed a request for action under 25 CFR 2.8, 5/ seeking, inter alia, compensation for livestock trespasses and the eviction of Frank Ereaux from Allotment 579. The Superintendent's decision, dated April 23, 1992, stated in part:

> This office first presented Mr. Frank Ereaux with trespass notification on June 18, 1991. This was followed up by a meeting with Mr. Ereaux where we advised him that his animals were in trespass due to these lands being under lease; the date of this meeting was July 1, 1991. On July 2, 1991, we followed

---

4/ The Superintendent's Apr. 23, 1992, decision, discussed infra, indicates that the homesite tract was included in the right-of-way acreage shown on the lease and the land schedule. The land schedule, however, is inconsistent with a map attached to the lease, and it is apparent that at least one of these documents is inaccurate. The map does not show Frank Ereaux's homesite. It shows BIA Route 8 running through both sec. 3 and sec. 10. This road evidently accounts for the major portion of the right-of-way acreage noted on the lease. According to the map, by far the greater part of the road lies within sec. 3. Yet, as noted above, the land schedule shows only 2.5 acres of right-of-way in sec. 3 and 10.93 acres in sec. 10.

5/ 25 CFR 2.8 provides:

"(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

"(i) Request in writing that the official take the action originally asked of him/her;

* * * * * * *

"(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request."

> up our meeting with Mr. Ereaux spelling out in detail what limitations he faced concerning the grazing of his livestock. On July 8, 1991, a compliance check was conducted on your leased premises with no livestock being found other than two horses in Mr. Frank Ereaux's corrals. A personal conversation at that time with Mr. Ereaux found that he had moved his livestock to another individual's land, and that his horses had been moved east of route 8.
>
> * * * * * *
>
> On August 13, 1991, personnel from this office impounded Mr. Frank Ereaux's horses. These animals were placed in the impoundment yard, and Mr. Ereaux and other registered owners of the livestock were notified.
>
> Your letter of November 25, 1991, * * * again addressed trespass problems which this office checked out, and found no livestock to be in trespass at that time. As a result, no action was taken.
>
> It is true that this office stated in response to your letter that we did not anticipate moving Mr. Frank Ereaux from his trailer, nor would we move his trailer. When [appellant's] lease was drawn up, this agency's Soil Conservationist removed 2½ acres of Allotment 579 for Mr. Ereaux's homesite and put this together under (with other acreage) rights-of-way so that you would not be charged for unusable acreage.
>
> In addition, our decision not to evict Mr. Frank Ereaux, nor move his trailer, was based on the fact that he had lived on that allotment (of which he has an undivided interest) since approximately 1985 or 1986. There had not (to our knowledge been) any complaints by the other landowners about his presence there until 5-6 years later when [appellant] decided to lease the acreage. Nor, to our knowledge had there ever been a court order placed to have him removed.

(Superintendent's Apr. 23, 1992, Decision at 1-2). Appellant appealed to the Area Director, who issued his decision on August 27, 1992. After discussing the issues, the Area Director concluded:

> The superintendent's decision that all incidents of trespass have been accounted for is upheld. According to the record submitted, compensation for impoundment expenses has been properly disbursed. The superintendent is directed to review records and ensure that proper disbursement did occur.
>
> The Superintendent's decision not to remove Frank Ereaux from the land is upheld. A 2 1/2 acre adjustment has been made to the

> lease, included in the right-of-way deletion from the leased acreage. Frank Ereaux is entitled to use the 2 1/2 acres for a homesite without further consent of the other co-owners. However, the co-owners should be paid fair market value for his use.
>
> Additionally, I find that [appellant] does not hold a valid BIA lease (No. 484-91-95) because [appellant], as a representative of four allotments, does not represent non-consenting owners, nor does it represent the Fort Belknap Tribes in Allotment No. T-580-A.
>
> If the lease was approved under the authority of the June [sic; should be July] 8, 1940, Act, all of the landowners should have received 90-day notices and, subsequently, the right to appeal the approval of the lease because their interests were leased without their consent. The regulation at 25 CFR 162.6, allows for the superintendent to commit the interests of landowners to a negotiated lease. The lease document does not indicate the uncommitted interests have been accounted for.
>
> Lease No. 484-91-95 is declared null and void because the proper lease authority is not documented nor were the rights and interests of the non-consenting landowners properly protected and accounted for. The superintendent is directed to take action to ensure fair market value compensation has been paid to the landowners of Allotment Nos. 579, 580, 585-A, and T-580-A.

(Area Director's Aug. 27, 1992, Decision at 3-4).

Appellant's notice of appeal from this decision was received by the Board on September 30, 1992. Only appellant filed a brief.

Discussion and Conclusions

The Board first addresses the Area Director's holding that lease 484-91-95 is null and void.

[1] The Area Director's decision is clearly correct with respect to the tribally owned tract, Allotment T-580-A. As noted above, the lease was not signed by any tribal official. No statute or regulation authorizes BIA officials to grant leases of tribal land. Only the Tribe may grant leases of its own land. E.g., 25 U.S.C. § 415 (1988); 6/ see 25 U.S.C. § 476(e). Accordingly, the lease is invalid with respect to Allotment T-580-A.

[2] By statute and regulation, BIA Superintendents are authorized to grant leases on behalf of individual landowners in certain circumstances.

6/ All further references to the United States Code are to the 1988 edition.

The statute cited by the Area Director, the Act of July 8, 1940, 25 U.S.C. § 380, provides:

> Restricted allotments of deceased Indians may be leased, except for oil and gas purposes, by the superintendents of the reservation within which the lands are located * * * when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three months' period to agree upon a lease by reason of the number of heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe.

25 CFR 162.2(a) provides:

> The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf. [7/]

In Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1 (1992), the Board held that a grant of lease under 25 CFR 162.2(a)(4) was invalid when there was a lack of evidence that the landowners had been unable to agree upon a lease during a 3-month period.

Here, the Area Director also found such a lack of evidence. In this case, however, it is not clear whether the evidence is truly nonexistent or whether it was simply not a part of the record before the Area Director. The issue of the lease's validity was not addressed in the Superintendent's decision or raised by appellant. It does not appear that the Area Director notified the Superintendent or the parties, prior to rendering his decision, that he intended to consider the issue. Thus, it is possible that the record sent to the Area Director was lacking documents concerning the 3-month negotiation period because the Superintendent did not expect such documents to be relevant to the appeal. As it happens, none of the documents in the record now before the Board, except for the landowner consents, relate to the period prior to approval of the lease.

[3] The regulations in 25 CFR Part 2 do not require an Area Director to advise the parties to an appeal that he expects to address an issue not

_____

7/ Although the Superintendent appears to have signed the lease only as approving official, the Board assumes, for purposes of this decision, that he intended also to act as grantor under 25 CFR 162.2(a).

decided by the Superintendent or raised by the parties to the appeal. When an error is apparent on the face of documents before him--for example, when a lease purporting to cover tribal land bears no tribal signature--the Area Director clearly has the authority to decide the issue without further ado. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them. 8/

Because it is not possible to tell from the record now before the Board whether evidence concerning the 3-month negotiation period is truly lacking, the Board finds that it must vacate the Area Director's holding that the lease is invalid as to the individually owned land, i.e., Allotments 579, 580 and 585-A. On remand, the Area Director should ensure that he has copies of all relevant documents from the Agency's files and should allow appellant and adverse parties an opportunity to present evidence concerning efforts to reach agreement during the 3-month period. 9/

The Area Director affirmed the Superintendent's decision not to remove Frank Ereaux from the 2.5-acre homesite on Allotment 579. Appellant contends that this tract is within its lease. As noted above, the lease itself is not clear on this point. However, the Superintendent could not have granted a lease of this tract under the authority vested in him by 25 U.S.C. § 380 and 25 CFR 162.2(a)(4), because that authority does not extend to land being used by an heir. Accordingly, the tract was either intentionally omitted from the lease or invalidly included in it. In either case, appellant does not have a valid lease covering the 2.5-acre tract and therefore cannot, as lessee, insist upon Frank Ereaux's eviction. Accordingly, the Area Director's decision is affirmed in this regard.

_____

8/ 25 CFR 2.21(b) provides:

"When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided."

9/ It is true, as the Area Director stated, that the Superintendent should have informed the non-consenting owners that they had the right to appeal his approval of the lease. For purposes of this decision, the Board assumes that the Superintendent failed to give the required notice. The effect of such a failure, however, is not to invalidate the lease approval but, rather, to extend the appeal period until proper notice is given. 25 CFR 2.7(b).

The non-consenting owners have been advised of all proceedings in this appeal and have been served with appellant's appeal documents. They have not participated in the appeal.

Evidently, Frank Ereaux has not compensated his co-owners for his use of the tract. 10/ The Area Director apparently intended that, upon remand of this matter to the Superintendent, Agency staff would assist Frank Ereaux and his co-owners in determining the proper compensation to be paid by Ereaux for his use of the tract. According to the Area Director's decision, "owner's use" arrangements are often informal, with no lease being entered into. It is possible that, given the animosities here, a formal lease arrangement would be preferable, if Ereaux continues to reside on the homesite. Even if it is determined that a formal lease is not needed, the Board agrees that BIA staff should assist the landowners in determining appropriate compensation.

Concerning the trespass issue, the Area Director's decision concluded: "The Superintendent's decision that all incidents of trespass have been accounted for is upheld. According to the record submitted, compensation for impoundment expenses have been properly disbursed. The Superintendent is directed to review records and ensure that proper disbursement did occur." Not only is this paragraph internally inconsistent, it also omits any discussion of trespass penalties and damages, addressing only impoundment expenses.

25 CFR 166.24(b) provides:

> Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass * * * together with the reasonable value of the forage consumed by their livestock and damages to property injured or destroyed, and, for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief where appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid, and reimbursement for expenses incurred in impoundment and disposal shall be credited as appropriate.

10/ He has, however, apparently received his share of the lease rentals. Contrary to appellant's contention, his acceptance of rental payments does not validate the lease if it is otherwise invalid. Peace Pipe, Inc., 22 IBIA at 7-8.

The Board has not addressed the question of Frank Ereaux's initial settlement on Allotment 579. Appellant's argument in this appeal has been that Ereaux's presence was a violation of its lease, an argument which the Board has rejected. Appellant's interest in this matter is solely that of a lessee. None of the individual landowners, who would have standing to challenge Ereaux's presence on an unleased portion of the allotment, are appellants in this matter.

A December 19, 1991, letter from the Superintendent to Michelle Ereaux states: "The only funds charged to [Frank] Ereaux were the costs incurred for impoundment action and for the feed and care given to the horses while they were impounded. These funds were then distributed back to the individuals involved in the impoundment and those feeding and watering the impounded horses."

Appellant states that neither it nor the individual landowners were credited with any amounts for penalties, damages, or forage consumed. Its statement is consistent with the Superintendent's December 19, 1991, letter and is not contradicted by anything in the record.

The Area Director's decision concerning trespass must be vacated because it fails to address the issue actually in dispute--i.e., whether the Superintendent should have collected penalties and damages from Ereaux, in what amount, and to whom they should have been distributed. The answer to these questions will, of course, depend to some extent upon whether or not the lease is valid.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's decision is affirmed insofar as it held that lease 484-91-95 is invalid as to Allotment T-580-A and insofar as it held that Frank Ereaux would not be required to move from his homesite on Allotment 579. In all other respects, the Area Director's decision is vacated. This matter is remanded to him for further proceedings in accordance with this opinion. 11/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

11/ In light of this disposition, appellant's request for an evidentiary hearing is denied.